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IN THE

Supreme Court of the United States

October Term 1942

No. 292

W. H. NEHER,

Petitioner,

vs.

A. E. HARWOOD, as Postmaster of the City of La Verne, California.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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A. E. HARWOOD, as Postmaster of the City of La Verne, California.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

To the Honorable the Supreme Court of the United States:

The petitioner, W. H. Neher, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered June 5, 1942 [R. 80] (..... Fed. (2d) .....) affirming a judgment of dismissal of the District Court for the Southern District of California [R. 63].

[R. 103]

Statement of the Matter Involved.

Petitioner brought suit in the District Court to enjoin respondent, the local postmaster at La Verne, California, from stamping petitioner's personal mail "Fraudulent" and returning it to the senders, and from otherwise carry-

ing out a postal fraud order of the Postmaster General [R. 23] purporting to have been issued under the so-called Postal Fraud Order Statute (U. S. C. A. Title 39, Sec. 259; R. S. 3929; 28 Stat. 946).

Petitioner sought injunctive relief upon the following grounds: that the order is void and issued in excess of statutory authority because it is unsupported by any evidence; that, in addition, it is affirmatively shown by the Findings of Fact of the Postmaster General that it is unsupported by the evidence [R. 7 and 31]; that the order was issued also beyond constitutional authority for the aforesaid reasons and also because of its provisions and the character of hearing at which it was made [R. 10 and 11]; that respondent cannot claim a void order of his superior, or anyone, as an excuse for violating petitioner's rights [R. 8].

Respondent moved to dismiss solely on the ground that "relief can only be granted against the Postmaster General who is not subject to the jurisdiction of the court" [R. 62]. The District Court granted this motion, and in addition, upon its own motion, and apparently through a misunderstanding, dismissed the action with prejudice upon the ground that no substantial question concerning the constitutionality of the statue is raised. There were no other grounds of dismissal [R. 4, 63, and Appendix A p. 8]. The Appellate Court affirmed [R. 103].

In neither of the lower courts did respondent contend that the complaint does not state facts sufficient to constitute a cause of action entitling petitioner to relief in some court [Appendix B p. 10]. As the record now stands petitioner not only cannot seek to enjoin the local

postmaster from committing asserted tortious acts against him but he cannot even seek to test the validity of the order of the Postmaster General in any district.

A summary statement of the allegations of the complaint [R. 7] and of the findings of fact of the Postmaster General [R. 37] are contained in the brief at page 17.

Petitioner relies not only upon the allegations of ultimate fact of his complaint, which must be assumed to be true for the purpose of testing the sufficiency of the complaint, but also upon the Findings of Fact of the Postmaster General, which are attached as Exhibit B to the complaint [R. 37], and which it was stipulated in an Agreed Statement Upon Appeal [R. 3], approved by the District Court [R. 6], constitutes the only exhibit of the complaint which is "necessary" or "material" to the Points Involved on the Appeal [R. 3 and 75, pars. II and III].

The opinion of the Appellate Court, by an obvious inadvertence, refers to missing exhibits and overlooks the aforesaid Agreed Statement and the fact that Exhibit B constitutes the Findings of Fact of the Postmaster General. It erroneously states: "Attached to the complaint is an exhibit (said Exhibit B) *which purports to be a record of all proceedings before the Post Office Department,* except Exhibits 12 to 15, and we are not informed as to these" [R. 100]. Due to this inadvertence the opinion condemns petitioner for, and quotes from, a highly prejudicial circular which was not related to the charges and which was not sent through the mail by petitioner, or anyone, with his authority [R. 100 and 29].

Jurisdiction of This Court and Statutes Involved.

(a) The jurisdiction of this court is invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925, c. 229; 43 Stat. 938; (28 U. S. C. A. Sec. 347).

(b) Petitioner does not attack the validity of the statute involved, the so-called "Fraud Order Statute" (39 U. S. C. A. Sec. 259), or of any statute, and all questions concerning the validity of the statute, if any existed, have been eliminated [R. 4, 5, 81 and 97, Appendix B p. 9]. (*Ex parte George Acret,* Dec. 15, 1941, 314 U. S. 585. Rehearing denied Jan. 12, 1942. 314 U. S. Adv. Sheets, No. 2, Appendix p. 18.) Proceedings may therefore be had independently of the provisions of 28 U. S. C. A. Sec. 380a. *William James & Co. v. Morganthau,* 307 U. S. 171; 83 L. Ed. 1189, 59 S. Ct. 804.

The material portion of the Postal Fraud Order Statute, with appropriate emphasis added, reads as follows:

> "The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any letters or mail matter arrive directed to any such person or company, * * * to return all such mail matter to the post office at which it was originally mailed with the word 'Fraudulent,' plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof. * * *"

R. S. 3929; Sept. 19, 1890, c. 908, Sec. 2, 26 Stat. 466; Mar. 2, 1895, c. 191, Sec. 4, 28 Stat. 946; 39 U. S. C. A. Sec. 259.)

Though the postal fraud order also purports to have been based upon Sec. 732 of said Title, the order is in fact not based upon that section [R. 36]. Sec. 732 relates to money orders and registered letters, none of which are involved here.

(c) The judgment of the Circuit Court of Appeals [R. 103] was made and entered June 5, 1942. The petition was filed in this court after July 5, 1942, and before September 4, 1942.

Questions Presented.

(1) Is the Postmaster General an indispensable party in a suit to enjoin a local postmaster in the district of his residence from stamping the word "Fraudulent" upon all mail addressed to petitioner, personal or otherwise, and returning it to the senders under color of an order alleged in the complaint to have been made beyond authority?

The following questions are merely incidental in appealing to the discretion of this court.

(2) Does the Postmaster General, upon proper charges and sufficient proof, merely have authority to stop the carrying out of a fraudulent scheme in which a person is then engaged, or is threatening to engage, or does he have the power to use the Postal Fraud Order Statute as a means of punishment for asserted past conduct, consisting of the supposed use of an asserted fraudulent

circular, which had no connection with the business with which petitioner was then engaged, and if ever used by petitioner at all, the findings of fact affirmatively establish, had been discontinued for a period of nearly three years? [R. 43.]

(3) Irrespective of the answer to the preceding questions does the complaint state facts sufficient to entitle petitioner to his day in court upon the merits in some district?

(4) Where the order complained of calls for the equivalent of a continuous branding by an agency of the United States Government of a person as a cheat and a fraud, thereby depriving him of one of his most precious liberties, to wit, his right to a good name, and where such branding is inescapable for life and so long as mail of any kind may be addressed to his name, or in the absolute discretion of such agency, was not petitioner in any event entitled to have had considered and decided by both the District Court and the Appellate Court the constitutional questions raised in the complaint, to wit: (a) whether any administrative agency can inflict a punishment such as has been inflicted here, and (b) whether an administrative agency in any event can take a portion—of a person's liberty—as distinguished from his property and inflict such a punishment, in the manner in which it was done here, to wit, at a hearing held 3000 miles from his place of residence, without the presumption of innocence, the right to a jury trial before an impartial judicial tribunal, and the protection of his other civil rights guaranteed by the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States?

Rulings of the Courts Below.

The District Court dismissed the action with prejudice [Judgment, R. 63]. Its minute order and memorandum opinion appear at R. 3, which incorporates by reference its opinion in *Acret v. Harwood* (41 Fed. 492), [Appendix A], decided concurrently therewith. The judgment, the memorandum opinion, and the opinion in *Acret v. Harwood,* establish with regard to Question 1 herein that the court granted respondent's motion to dismiss solely on the grounds that the Postmaster General is an indispensable party, and that no substantial question concerning the constitutionality of the Postal Fraud Order Statute is stated [R. 63 and 4, and Appendix A p. 7].

It is merely incidental to an appeal to this court's discretion that in dismissing the action with prejudice the District Court confused the issues with those in *Acret v. Harwood* [R. 4], in which the question of the constitutionality of the statute was the only question involved [R. 97].

The Circuit Court of Appeals in its opinion filed June 5, 1942 (..... Fed. (2d) .....) [R. 80], expressly ruled with regard to Question Number 1 herein that the Postmaster General is an indispensable party [R. 97]. It also ruled that the complaint states no cause of action [R. 102].

The Appellate Court did not rule upon Questions Numbered 2 and 4 herein. These questions were raised by the allegations of the complaint (Brief p. 17) [R. 7 to 61], the Statement of Points on Appeal [R. 74] and they were assigned in Appellant's Opening Brief as reasons for the invalidity of the postal order under para-

graphs 1, 3, and 4, and therein under "Questions Involved" under paragraphs 1, 2, and 3 [Appendix B pp. 9 and 10].

Petitioner realizes that the opinion of the Appellate Court makes him appear unworthy of much consideration. He therefore feels impelled, before the opinion is read, to respectfully call attention to the fact that, for the purpose of testing the sufficiency of the complaint, it fails to assume as true his allegations of ultimate fact (Brief p. 99) and it condemns him and determines him guilty of fraud by begging the principal facts and by ignoring his principal questions of law, among which was, whether the highly prejudicial circular, quoted at length in the opinion [R. 100], was immaterial to the proceedings, and whether there was any finding or proof that this writing was ever used or sent through the mail by petitioner, or any person with his authority [R. 29 and 40].

It overlooks that there was an Agreed Statement on Appeal, approved by the trial court, and that Exhibit B is the Findings of Fact of the Postmaster General (and not the record of the proceedings as erroneously assumed by the court) and that its deficiencies are those of the Postmaster General and not those of this petitioner [Opin. R. 100].

The opinion completely disregards the fact that petitioner is seeking to avoid a continuous and degrading punishment, probably in excess of that imposed in any criminal

case, and that even the lowest criminal is entitled to his day in court.

It attempts to minimize the serious effect of the Postmaster General's perpetual order upon an expectation that he would relax this order upon a proper showing [R. 102], while it would seem that in no free country should a citizen be condemned to punishment, perpetually, for life, or at all, by an administrative official, nor should he be dependent upon the largess of such an official for restoration of any part of his liberties.

Reasons for Allowance of the Writ.

Reason I.

The Circuit Court of Appeals held in the case at bar that the Postmaster General is an indispensable party [R. 97].

The opinion is in conflict with *Rood v. Goodman* (Fifth Circuit, 1936), 83 F. (2d) 28, 31, which like the case at bar was an action to enjoin the defendant local postmaster from withholding the plaintiff's mail under color of an identical postal fraud order alleged to have been made beyond authority. In that case, as well as in other cases cited and quoted in the brief, the court held that the Postmaster General is not an indispensable party and stated as follows:

> "* * * until a valid fraud order is issued against him, a citizen of the United States has, under the laws as they now stand, not a mere privilege, but

a right, to the use of the mails, and in the course of regular deliveries, to receive mail sent to him. When, then, a postmaster unlawfully withholds delivery, the owner of the mail has a right to proceed against the postmaster to prevent that wrongful interference with his property and his rights. This is not a case in which the plaintiff is attempting to compel a subordinate official to exercise a discretion which only his superior can exercise. It is a case in which an official is acting affirmatively against a plaintiff, by seizing his mail, and preventing its delivery. It is that affirmative action which the suit seeks to enjoin [as here]. Colorado v. Toll, 268 U. S. 228, 45 S. Ct. 505, 69 L. Ed. 927; Yarnell v. Hillsborough Packing Co. (C. C. A.), 70 F. (2d) 435; Ryan v. Amazon Pet. Corp. (C. C. A.), 71 F. (2d) 1."

The opinion in the instant case recognizes the aforesaid and other conflicts and cites *Rood v. Goodman, supra,* and states:

"In view of the fact that there is confusion in courts as to the necessity of joining superior officers *when acts of subordinates are sought to be enjoined* we have made a fairly thorough examination of the decisions and opinions upon the subject in an attempt to discover a principle which will *largely* reconcile them.

* * * * * * * *

"In 1936 the Honorable Learned Hand, United States Circuit Judge for the Second Circuit, wrote the opinion of that Court in the case of National

Conference on Legalizing Lotteries, Inc. v. Goldman, 85 Fed. (2d) 66, in which he analyzed the cases on the subject. Yarnell v. Hillsborough Packing Co., Ryan v. Amazon Petroleum Corporation and *Rood v. Goodman* are all interpreted as holding that Colorado v. Toll [268 U. S. 228] overruled Gnerich v. Rutter and Webster v. Fall [which latter cases held the superior indispensable]."

REASON II.

Whether the Postmaster General is an indispensable party involves an important question of federal law which has not been, but should be settled by this court. It is important because of its frequent occurrence. The number of the order involved here indicates that it is close to being the sixteen-thousandths which has been made [R. 23], in all of which consideration of the possibility of a contest necessarily involved the question of where suit may be commenced and against whom [R. 23]. The question also arises with relation to the orders of other agencies.

The question is important for the compelling reason that if a citizen on the Pacific Coast must commence a suit in the District of Columbia to prevent a local official from violating his rights under claim of immunity of a void order, or under any other excuse, then liberty in America is in serious jeopardy. In such circumstances an administrative agency could violate a citizen's rights in any manner it might choose and in probably ninety-nine cases out of a hundred the citizen would be power-

less to protect his rights and wholly without any practicable means of relief. The civil liberty provisions of the Constitution would then be mere high sounding phrases as to those most in need of their protection.

It would seem that this is one of the most important civil liberty questions now pending in the United States.

This case is a proper vehicle for consideration of this important question by this court especially for the reason that it appears that petitioner is the first and only litigant who has seen fit to present it in this aspect, though it has been before courts for more than fifty years.

The fact that counsel are personally bearing the expense of these proceedings as a contribution to that which they believe vitally affects the national welfare may furnish additional ground for an appeal to this court's discretion.

Reason III.

If it may be said that the aforesaid Question Number 1 has been settled by this court in *Colorado v. Toll,* 268 U. S. 228, 45 S. Ct. 505, 69 L. Ed. 927, and in *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94, 47 L. Ed. 90, 23 S. Ct. 33, then the decisions of the lower courts herein are in conflict with such decisions.

Reason IV.

Questions Numbered 2 and 4 involve questions of federal law which have not been, but should be settled by this court. They have some importance because they involve fundamental questions of administrative law which are necessarily of frequent occurrence.

REASON V.

By denying petitioner a hearing on the merits in some court, the lower courts so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision (Questions Numbered 3 and 4).

For these reasons it is respectfully prayed that the petition be granted.

W. H. NEHER,
Petitioner.

We hereby certify that the within petition is well founded and not interposed for delay.

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Investment Building, Washington, D. C.,
Attorneys for Petitioner.

State of California, County of Los Angeles—ss.

W. H. Neher, being by me first duly sworn, deposes and says: that he is the petitioner in the within proceeding in the above entitled action; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

W. H. NEHER.

Subscribed and sworn to before me this 5th day of August, 1942.

(Seal) LESLIE SKEEN,

Notary Public in and for the County of Los Angeles, State of California.

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A. E. HARWOOD, as Postmaster of the City of La Verne, California.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

An opinion was filed in the District Court by Judge Leon R. Yankwich in the case of *Acret v. Harwood,* which by reference was made the opinion in this case [R. 4, Appendix A], 41 F. Supp. 492. It would seem that the court in considering a motion to convene a three-judge court in the former case confused the issues in these cases [R. 4].

The opinion of the Circuit Court of Appeals was written by Judge Albert Lee Stephens, and filed on June 5, 1942 [R. 80 and 102] (..... F. (2d) .....).

Comment concerning misconstruction of the facts contained in these opinions appears in the Petition at page 3.

Jurisdiction.

The jurisdiction of this court is shown in the petition at page 4. The lower courts had jurisdiction as follows:

The judgment of the District Court was made and entered October 29, 1941 [R. 63].

Notice of appeal from such judgment and statutory cost bond were filed January 27, 1942 [R. 74]. As established by the complaint [R. 8], the action is one arising under the postal laws. Jurisdiction in the District Court was therefore under 28 U. S. C. A., Sec. 41(6).

Jurisdiction in the Circuit Court of Appeals was under the provisions of 28 U. S. C. A., Sec. 225 (a) and (d).

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In holding that the Postmaster General is an indispensable party.

(2) In taking into consideration the circular referring to a Cosmic Rectifier, where it was not shown that this circular had ever been sent through the mail by petitioner, or any person with his authority, and where its use had been discontinued for a period of three years.

(3) In holding that the complaint does not state facts sufficient to constitute a cause of action.

(4) In ignoring the constitutional questions presented, to-wit: (a) whether an administrative agency can inflict a punishment such as has been inflicted here, and (b) whether it can take a portion of a person's liberty—as distinguished from his property—and inflict such a punishment, in the

manner done here, to-wit, at a hearing held three thousand miles from his place of residence, without the presumption of innocence, the right to a jury trial before an impartial judicial tribunal, and the protection of his other civil rights guaranteed by the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States.

Statement of the Facts.

Respondent at no time questioned that the complaint states facts sufficient to entitle petitioner to relief in some jurisdiction [Appendix B, p. 10].

Since the complaint was dismissed on motion, the allegations of the complaint constitute the facts of the case. From these allegations, which for the purpose of testing the sufficiency of the complaint must be taken as true, it appears:

The post office department notified petitioner by mail at his place of residence at La Verne, California, to show cause at Washington, D. C. on a day stated why a postal fraud order should not be made against him under the provisions of U. S. C., Title 39, Sec. 259, on the ground that petitioner was "THEN" obtaining money by means of fraudulent representations and promises contained in a writing sent through the mail "TO THE EFFECT" that by placing "tuning-in cards" in a so-called COSMIC GENERATOR that he could remove the cause of and cure 97% of every form of disease", and "that the results aforesaid would be accomplished regardless of distance" [R. 15].

In view of the additional expense involved in a hearing held at Washington and in reliance upon the fact that said charges were false and could not be proven, petitioner

did not attend, or employ an attorney to represent him, at such hearing [R. 16]. Petitioner asserts in his complaint that he in fact did not make the representations set forth in said charges, or any misrepresentations whatsoever [R. 16], and no evidence was adduced at such hearing to establish that he ever made such representations "in effect", by innuendo, or under any possible construction [R. 22]. The Postmaster General nevertheless made a perpetual order requiring all of petitioner's mail, personal and otherwise, to be stamped "FRAUDULENT" and returned to the senders [R. 23].

The Findings of Fact of the Postmaster General [attached as Exhibit B to the complaint, R. 38 to 61] establish:

That commencing "in the early part of 1938 * * * remittances were solicited by means of a printed circular * * *" [R. 40]. It appears that this circular, however, has no relation to the writing referred to in the charges [R. 40]. It does not refer to "placing tuning-in cards in a Cosmic Generator". It refers to a machine known as a Cosmic Rectifier shown by the pictures contained in the findings to be a different machine for a different purpose [R. 41 and 53]. There is no finding that it was sent through the mail [R. 40]. It has no relation to the business in which petitioner was then engaged [R. 43].

It is found with relation to this circular that: "After a number of months (after 'the early part of 1938'), the '*use*' of the foregoing circular was discontinued by Neher * * *" [R. 43].

The postal proceedings were not commenced until March 30, 1941 [R. 38], which is nearly three years after the "use" of this circular was discontinued. This is the cir-

cular which is cited and quoted at length in the opinion of the Appellate Court [R. 100] as a justification for the order of the Department holding petitioner guilty of fraudulent use of the mail.

It is the theory of the complaint that these Findings of Facts therefore affirmatively establish that the Post Office Department has attempted to use the highly prejudicial circular concerning a machine known as a Cosmic Rectifier as partial support for its order [R. 41], and since the use of this circular in any manner had been discontinued and since no writing or asserted fraudulent scheme involving this machine or this circular was referred to in the charges [R. 15 and 39], petitioner had no notice or opportunity to be heard concerning it, and for such reason, among others, the order was made without due process of law [R. 29].

It is further the theory of the complaint that in order to meet the requirements of due process the charges of the Postmaster General should have stated the exact words of the writing which it was contended was fraudulent, instead of merely stating his conclusions as to its "effect", and that in view of the fact that the hearing was to be held three thousand miles distant petitioner was especially entitled to be precisely informed as to the charges against him in order that he might be able to judge of the necessity of traveling such a distance to defend himself.

There is also set forth in the findings, in *haec verba*, another writing, which is the only circular which petitioner was then circulating [R. 43 to 50], or had been circulating for nearly three years. The only express representation which this circular contains with reference to the

power to cure is: "Harmonized prayer knows no bounds. Distance means nothing to the power of prayer" [R. 48].

Though the contents of this circular [R. 43 to 50] will undoubtedly seem extremely silly to every member of this court, it contains none of the representations stated in the charges and it would seem that it contains no representations for which this petitioner should be adjudged guilty of fraud and punished by an order for a continuous public branding for life in the manner done here.

The only representations in this circular upon which the Findings of Fact rely in support of the order, and which even remotely resemble the charges made, are segregated and expressly repeated in the Findings at R. 57. In the Findings of Fact, with appropriate emphasis added, it is stated:

> "In the answer of Neher to the charges he states: 'I make no promises or representations to cure anything.' However, it will be noted that in quotations from his recent circular matter, hereinbefore set forth, he states:
>
> Q. Will the Cosmic Forces *set in motion through prayer* cure every form of disease or ailment? A. *If* a Cosmic Field *could be* produced that would be *in perfect harmony with God* that *might be possible.* Under our present setup *perhaps not over* 97 percent *will yield* to General Prayer. About 2 percent will need special prayer which may have to be repeated many times. About one percent will not yield under our present Methods" [R. 57].
>
> "From the foregoing statements it is manifest that as charged in the Memorandum, this promoter is in fact promising to cure 99 percent of 'every form of disease or ailment'" [R. 58].

It is the theory of the complaint that the Findings of Fact therefore affirmatively show the petitioner did not represent or promise that by placing tuning-in cards in a "Cosmic Generator" he could cure 99% of every form of disease, but that he in fact merely represented in substance and "in effect" that *perhaps* 97% of every kind of disease *will yield to prayer,* which does not correspond to the charges, or justify the Findings of Fact, and is obviously no actionable representation at all.

With reference to the charge that petitioner promised *"in effect* that the results aforesaid would be accomplished regardless of distance," the circular in fact states, *in exact words,* in question and answer form, as follows:

> "Q. We understand that you have a Cosmic Generator in your Laboratory that will transmit harmonizing power to people at a distance and thus get all parts of the body back into harmony. Is that true? A. Yes, it is true we have a Cosmic Generator in our Laboratory, but *we make no claims that it will transmit power of any kind to a person at a distance* * * *" [R. 45]. (Emphasis added.)

It is petitioner's theory that he represented in fact directly the opposite of the representations erroneously stated "in effect" in the charges and that the Findings of Fact affirmatively so show.

Petitioner further alleges in his complaint, and for the purpose of the motion to dismiss these allegations also must be taken as true, as follows:

Many persons believe that they are benefited by petitioner's said efforts and service in connection with his said business and they are in fact being benefited by said efforts and service, and none of his customers have ever

been dissatisfied or have ever claimed that his said efforts and service have in any manner been misrepresented to them or that they had wasted the small sum of $1.00 per month which they have paid to the plaintiff. To his knowledge, no persons have ever objected to his manner of operation of said business, except the California State Medical Board which was responsible for the commencement of said proceedings. Petitioner's said enterprise is legal and legitimate and is conducted in accordance with high ethical and moral standards, and is founded on the belief that God will help those who demonstrate their faith in Him and on the proposition that the mind of the human race is largely responsible for its ills and is a perceptible factor in treating, curing, benefiting and remedying said ills and that the power of prayer and of mental healing, otherwise known as auto suggestion, together with the use of said cosmic generator, is helpful to the human health, all as stated in and as limited by the statements contained in the aforesaid circular [R. 31].

It is the theory of the complaint that the postal order is void and made beyond statutory authority because it was made without evidence to support it [R. 17 and 31], and that for such reason and because of its provisions and the manner in which it was made [R. 8 to 12], its execution constitutes a taking of petitioner's liberty and property without due process of law in violation of his constitutional rights under the 4th, 5th, 6th, and 8th Amendments [R. 8].

In short, it is the theory of the complaint that upon such a record, and under the Constitution of the United States, the Post Office Department has no jurisdiction to find petitioner guilty of fraud or to condemn him to be publicly and continuously branded for life, or for so long as the department may arbitrarily choose, or at all.

ARGUMENT.

POINT I.

The Postmaster General Is Not an Indispensable Party Where One Seeks to Enjoin the Affirmative Acts of a Local Postmaster in Marking One's Mail "Fraudulent" and Returning it to the Senders Under Color of an Order Made Beyond Authority.

(a) This Question Should be Reviewed by This Court Because the Decision of the Appellate Court Is in Conflict With Rood v. Goodman and Other Appellate Court Decisions and Apparently With Decisions of This Court.

In *Rood v. Goodman, supra*, the court states as follows:

> "There have been some civil suits over fraud orders brought against the Postmaster General, but most of the suits of that kind have been brought and maintained against the local postmaster. American School of Magnetic Healing v. McAnnulty, *supra*; Leach v. Carlile, 258 U. S. 138, 42 S. Ct. 227, 66 L. Ed. 511; Public Clearing House v. Coyne, 194 U. S. 497, 24 S. Ct. 789, 48 L. Ed. 1092; and in the inferior courts, Enterprise Mfg. Ass'n v. Zumstein (C. C. A.) 67 F. 1000, 1002; Crane v. Nichols (D. C.), 1 F. (2d) 33; Aycock v. O'Brien [C. C. A. Ninth], 28 F. (2d) 817; and other cases without number. It is only recently, and in only two District Court cases, that it has been claimed that the Postmaster General is an indispensable party to such a suit. In one of these, Wheeler v. Farley [D. C. Cal. S. D.], 7 F. Supp. 333, the proposition was sustained; in the other Bailey, Gaunce Oil & Ref. Co. v. Duncan (D. C.), 10 F. Supp. 280, it was denied."

The opinion herein is also in conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Moore v. Anderson,* 68 Fed. (2d) 191, and apparently with the decision of this court in *Colorado v. Toll, supra,* in which the Circuit Court, in referring to and quoting from *Colorado v. Toll,* says:

> "As stated in the opinion, at page 230 of 268 U. S., 45 S. Ct. 505, 506, 69 L. Ed. 927: 'The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do * * * and that derogate from the *quasi*-sovereign authority of the State. *There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States.*" (Cases cited.)
>
> "In thus stating the rule, the Supreme Court used the word 'authority' as it had been used in the beginning of the opinion; that is, '*beyond the authority conferred by the acts of Congress.*'" (Emphasis added.)

It would appear that the words "that derogate from the *quasi*-sovereign authority of the state" are not controlling of the opinion. A common citizen has the same right to protection in the district of his residence against unauthorized acts of a government official as has a state. He has much greater need of it. A state can afford to prosecute a suit against the government at Washington, D. C., through its attorney general, while probably not one citizen in one thousand on the Pacific Coast could afford to do so.

In *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 109, 110, 23 S. C. T. 33; 47 L. Ed. 90, it was held that where it is alleged that the Postmaster General made a postal fraud order without sufficient supporting facts that the complaint states facts establishing the order as void and *made beyond the authority conferred by the Acts of Congress.* Though no court appears to so concede, the decision appears to directly uphold the propriety and jurisdiction of a suit against a local postmaster. This court stated:

> "* * * irreparable injury will be done to these complainants by the mistaken act of the Postmaster General in directing the defendant to retain and refuse to deliver letters addressed to them. The Postmaster General's order being the result of a mistaken view of the law could not operate as a defense to this action on the part of the defendant (a local postmaster), though it might justify his obedience thereto until some action of the court. In such a case, as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts) [Referring to said Title 39, Sections 259 and 732.] and therefore it was his duty upon complaint being made to decide the question of law whether the case stated was within the statute, yet such decision being a legal error does not bind the courts."

The existing conflicts are recognized in *National Conference on Legalizing Lotteries, Inc. v. Goldman* (Second Circuit, 1936), 95 Fed. (2d) 66, 67, in which Judge

Learned Hand cites the aforesaid decisions and others and states that *"The Ninth (Circuit) has decided the point both ways."* He further states:

> "How far these decisions are to be generalized is not yet clear, and it is not very likely to become so *while the grounds remain so vague.* * * * So the matter stands on authority; it must be owned that the law is not as clear as one might wish. * * * Officials are frequently bothered by contrary rules of inferior federal courts and can hardly be expected to accept a single one, even if they stand uncontradicted, *and they may reasonably not give up their views until the final authority has spoken.*" (Emphasis added.)

By the decision in the instant case it would appear that this important question is now left in still greater confusion.

(b) This Question Involves an Important Question of Federal Law Which Has Not Been, But Should be Settled by This Court.

It appears not to be conceded in any of the decisions that this question has been settled by this court. In any event, it appears that neither this court nor any court has had occasion to settle the question upon the real grounds upon which it would appear the decision should be based.

In *Rood v. Goodman, supra,* at page 31, the court states:

> "The defect of want of parties does not go to the jurisdiction of the court to entertain it; it goes to its discretion as a court of equity to entertain it."

What equities exist in favor of the citizen, that is, the manner in which a postal fraud order is made, its serious

consequences, and the complete absence of any reason or necessity for compelling a suit to prevent the execution of such an order to be brought only against the Postmaster General at Washington, D. C. seem never to have been considered.

Recent decisions indicate that the postal department now makes a regular practice of moving to dismiss all of these postal fraud cases upon the sole ground that the Postmaster General must be made a party defendant. (*Ernest v. Fleissner,* 38 Fed. Supp. 326; *Scientific Mfg. Co. v. Walker,* 40 Fed. Supp. 465.) Where such a motion is granted the plaintiff is of course obliged to bring a new action in the District of Columbia. Here, the fraud order has been made against an individual person, as distinguished from a firm or corporation [R. 23]. In the case of an individual living on the Pacific coast (as here), or in Hawaii, or Alaska, probably not one in one thousand could afford to prosecute an action against the government in Washington, D. C. Therefore, in practically every instance, when the motion to dismiss is granted, a person finds himself helpless to further resist a postal fraud order, however unfounded or unjust it may be.

This court has held:

> "The opportunity to defend must not be merely colorable or illusory." (*Polko v. State of Connecticut,* 302 U. S. 319, 82 L. Ed. 288, 55 S. Ct. 149.)

Yet there is not any proper or sensible reason why these cases should be brought in the District of Columbia, or why the Postmaster General should be a party. It would seem that he is unlikely to be aware even of the existence of any particular case. As alleged in the com-

plaint, he signs these fraud orders merely as a matter of routine upon the recommendation of his subordinates [R. 11]. Certainly the Postmaster General does not assist in defending any of these cases, and he undoubtedly never is a witness. He knows nothing of the facts. The transfer of these cases to Washington is therefore not even for his personal convenience. If the convenience of his subordinates must be suited then he can appoint a subordinate as easily in California as in the District of Columbia.

Furthermore, these cases are generally tried by the district courts upon the record which was made at the hearing before the Department. Upon that record they can be tried just as readily in one district as another. Such an order is not even for the convenience of witnesses. If witnesses were permitted to testify they would more than likely all come from the place where the offense is asserted to have been committed.

Also, from the standpoint of convenience of the government, or of the government's attorneys (if such an element could be properly taken into consideration) the government can just as readily provide competent attorneys in the Southern District of California as in the District of Columbia. It had such attorneys in court for the purpose of making the motion to dismiss.

It is the local postmaster who is the real and necessary party. It is he who is committing the tortious acts complained of and it is against him that the plaintiff needs and is entitled to injunctive relief. As pointed out in *Bailey Gaunce Oil Co. v. Duncan*, 10 Fed. Supp. 280, one seeks to enjoin a sheriff from carrying out a void order, not the court which issued it.

From the foregoing it would appear as an inevitable conclusion that the only possible purpose for the government's motion to dismiss is to accomplish the only result which it generally does accomplish—to prevent the plaintiff from resisting or questioning the Postmaster General's order at all.

In this instance it would have accomplished just that if petitioner's attorneys had not chosen to personally meet substantially the entire expense of these proceedings.

Our forefathers fought the Revolutionary War to prevent just this sort of oppression.

> "He (the King) has called together legislative bodies at places unusual, uncomfortable, and distant * * * for the sole purpose of fatiguing them into compliance with his measures."

It is an astonishing fact that no court seems to have been called upon to consider that a postal fraud order requires all mail of every character, personal or otherwise, to be returned to the senders and that this is equivalent to branding a person under the seal of the United States government. A person might just as well be required to carry around his neck a sign reading:

> "This man has been found guilty of fraud by the United States government."

Such an order requires a still more severe form of branding. It calls for a form of public degradation from which the person branded cannot escape even by remaining indoors. Wherever he lives for the balance of his life, or so long as the Postmaster General may see fit, someone will inevitably send him a personal letter, a bill, or an advertisement, all of which will be subject to the order.

It would seem well nigh impossible for a person to earn an honest living under such a handicap. It is a punishment, the payment of which he can never complete. Even after he dies communications will be sent to his name as listed in a directory and they will all be returned stamped "Fraudulent" to impugn his memory.

It is a cause for alarm that such an un-American procedure should have been ignored for fifty years. It involves a worse form of cruelty than branding on the face or hand. Yet, Blackstone especially frowned upon "branding on the face or hand" in 1753 (4 Blackstone 376), and it is said that the delegates to the convention "had Blackstone's statement largely in mind" in framing the Eighth Amendment. (*Davis v. Berry,* 216 Fed. 413.)

Such a branding deprives a person of his most precious liberty,—his Sacred Honor. Our forefathers, in signing the Constitution, placed their "Sacred Honor" on an equality with their property—and their lives.

In *Neafie v. Hoboken Printing Co.*, 75 N. J. L. 564, 60 A. 146, it is stated:

> "The right of a person to be secure in his reputation * * * is a part of the right of enjoying life and pursuing and obtaining the safety and happiness which is guaranteed by our fundamental law."

As stated in *Myers v. Nebraska*, 262 U. S. 390:

> "Liberty denotes not merely freedom from bodily restraint, but also the right * * * generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free man."

It would appear that such an order calls for a punishment which is unquestionably greater than that permitted in a criminal case. If a criminal court should impose such a punishment a storm of protest would doubtless arise throughout the land.

Such a punishment is out of all proportion to the offense asserted to have been committed. Here, two hundred people have been each sending petitioner the sum of one dollar a month. None has any complaint [R. 31]. Only the California State Medical Board complains and seeks to prevent these few people from patronizing the plaintiff [R. 31].

What Mr. Justice Holmes and what Mr. Justice Brandeis thought of these orders is expressed in their dissenting opinion in *Leach v. Carlile*, 258 U. S. 138, 141, 66 L. Ed. 511, 42 S. Ct. 227, as follows:

> "The statute under which fraud orders are issued by the Postmaster General has been decided or said to be valid so many times that it may be too late to expect a contrary decision. But there are considerations against it that seem to me never to have been fully weighed * * *.
>
> "* * * We have not before us any question as to how far Congress may go for the safety of the nation. The question is only whether it may make possible irreparable wrongs and the ruin of a business in the hope of preventing some cases of a private wrong that generally is accomplished without the aid of the mail. Usually private swindling does not depend upon the postoffice. If *the execution* of this law does not abridge freedom of speech, I do not quite see what could be said to do so * * *." (Emphasis added.)

The Congress which passed the fraud order statute in 1890 is the same Congress which refused to adopt the first Pure Food and Drug Act, the only possible justification for which refusal being that it hesitated to deprive persons of profit who might wish to sell impure foods to the public. This same Congress in adopting this statute apparently never stopped to consider that it could have provided the Post Office Department with a much more satisfactory and effective remedy if it had authorized it to enjoin fraudulent use of the mail through application to the District Court in the asserted offender's district of residence. It would thereby have avoided the necessity for summary orders made by the Department itself, the useless branding of American citizens for life, and the cutting off of the right of every person in the United States to communicate by mail with every person against whom a fraud order is made. It seems unbelievable to petitioner that this country would tolerate the existence of this statute. Yet, this court refused in December, 1941, to consider the question of the unconstitutionality of this statute in *Ex parte Acret, supra.*

In any event, in view of the doubtful constitutionality of this statute, and of the severity of the penalty inflicted and of the manner in which a fraud order is made, it would seem that a court of equity should permit a person affected, complaining as a suppliant at its doors, to have a full hearing on the merits up to the extreme limit of its jurisdiction.

It would seem that, aside from these equities, the real reason why respondent can be sued in the district of his residence, without the necessity of joining the Postmaster General, is that any person has the right to prevent anyone, including a local postmaster, from violating his personal liberties or property rights. The possession of a void order furnishes no ground for immunity. A subordinate government official is no more immune from suit than would be petitioner's stenographer if she should break a store window under petitioner's order.

As pointed out in *Teal v. Felton*, 12 Howard 284:

> "It is the law which gives jurisdiction (for postal regulations and orders) and nothing less than the law can give irresponsibility to the officer (the local postmaster), although he may be acting in good faith under instructions from his superior * * *. Here the instructions exceed the law" (as here).

To require such a suit to be brought in the District of Columbia instead of in the district where the void order is sought to be enforced is not in accord with the spirit of Rules 1 and 4(4) of the Federal Rules of Civil Procedure. It is not a means of effecting a "just, speedy and inexpensive determination" of an "action attacking the validity of an order of an officer or agency of the United States not made a party."

No court appears to have been called upon to give this question consideration from these viewpoints.

POINT II.

The Department Cannot Make a Postal Fraud Order by Way of Punishment for a Circular Asserted to Have Been Used Through the Mail in the Past and the Use of Which Has Been Discontinued and Which Has No Connection With the Present Business of Petitioner.

This is a question which is subordinate to an appeal to this court's discretion but which has not been but should be decided by this court.

As established by the findings of fact the circular concerning the Cosmic Rectifier had not been used by anyone for a period of nearly three years [R. 43].

The authority of the Postmaster General extends no further than that expressly given him by the statute. The statute authorizes him to make a fraud order only against any person who IS engaged in the conduct of any scheme for obtaining money by fraudulent pretenses, etc. [R. 9]. The charges which the Postmaster General made were with reference to a writing which the plaintiff was THEN circulating [R. 15 and 39]. Also, the fraud order, upon its face, purports only to relate to, and to be based upon, a fraudulent scheme in which the plaintiff was THEN engaged [R. 23].

Yet, as part of its Findings of Fact, the Department sets forth the contents of this discontinued circular as partial support of its order, all without any proof or finding that this circular was in any way related to the business in which petitioner was then engaged and where the circular upon its face shows that it is in no way related [R. 41]. The Circuit Court quotes from this circular at length and states that it "bristles with the indicia of deception and fraud", and holds it up as justification for petitioner having been held guilty [R. 100].

POINT III.

The Complaint States a Cause of Action and by Refusing to Grant a Hearing in Some District Upon the Merits, Both Upon the Factual Allegations and Upon the Constitutional and Other Law Questions Presented, the Lower Courts Have so Far Departed From the Accepted Course of Judicial Proceedings as to Call for the Exercise of This Court's Power of Supervision.

From the Statement of Facts, *supra,* it would appear that the circular concerning the Cosmic Generator [R. 43], being the circular then being used and obviously the writing referred to in the charges, is the writing which must support the order if the order is to be considered as supported at all. An examination of this circular [R. 43 to 50] would indicate that it is innocuous, and that though it may seem to a rational mind to be extremely silly it does not contain representations which may be construed as that character of fraud which is sufficient to invoke the severe penalty imposed by this statute.

As stated in the *McAnnulty* case, *supra:*

> "* * * these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis" p. 104).

The situation is somewhat similar to that in *Harley v. Dolan,* 297 Fed. 825, which involved the sale of lucky stones, and in which the Post Office Department had made charges, "in effect" (as here) and had attempted to rely

upon a circular the use of which had been discontinued (as here). In that case the court stated:

> "The District Court finds that: 'A comparison of the Rand circular and the Dolan circular shows that these findings are erroneous; . . . that none of the false representations which were contained in Rand's circulars and formed the basis of the criminal prosecution and fraud order against him are made by the complainant; . . . that no false statement or representation is made by the complainant in her advertising; that the testimonials appear to be genuine; that *the Dolan circular is designed to sell lucky stones, and does so without falsehood or misrepresentation; that there is nothing immoral in the belief that gems or amulets affect the wearer's fortunes;* that if the complainant wishes to sell lucky stones for what they are, without lying about them, she is not acting fraudulently in so doing.'
>
> "We think the facts set out in the agreed statement show that the conclusion reached by the Postmaster General was clearly wrong and that the decree of the District Court should be sustained. *The difficulty with the conclusion of the Postmaster General was due to the erroneous statements* (as in the instant case) *contained in the memorandum of the solicitor as to the contents of the complainant's circulars . . .*" (stated "in effect," as here.) (p. 826.) (Emphasis added.)

Considering petitioner's circular in its worst possible aspect, and ignoring all of the allegations of his complaint, the words of the *Dolan* case may be appropriately paraphrased here:

> The latest circular is designed to sell prayer cards and does so without falsehood or misrepresentations;

there is nothing immoral in the belief that prayer cards are beneficial to the subscriber's health.

In other words, there does not exist that "fraud in fact" which was held essential in the *McAnnulty* case. The circular contains no fraudulent representations at all.

Here, the plaintiff alleges in addition affirmative facts establishing that his business is conducted upon a fair and honest basis. It happens that the allegations of plaintiff's complaint at R. 31 are almost identical with allegations held sufficient in the *McAnnulty* case. In that case, this court, at pages 101 and 103, stated with reference to such identical allegations:

"These allegations are not conclusions of law, but are statements of fact upon which, as averred, the business of the complainants is based, and the question is whether the complainants who are conducting the business upon the basis stated thereby obtain money and property through the mails by means of false or fraudulent pretenses, representations or promises. Can such a business be properly pronounced a fraud within the statutes of the United States?" (p. 103.)

"* * * The bill in this case (as in the instant case) avers that those who have business with complainants are satisfied with their method of treatment and are entirely willing that the money they sent should be delivered to the complainants. (*As here.*)

* * * * * * * *

"That the complainants had a hearing before the Postmaster General, and that his decision was made after such hearing, cannot affect the case. The allegations in the bill as to the nature of the claim of

complainants and upon what it is founded, is admitted by the demurrer, and we therefore have undisputed and admitted facts which show upon what basis the treatment by complainants rests, and what is the nature and character of their business. From these admitted facts it is obvious that complainants, in conducting their business, so far as this record shows, do not violate the laws of Congress. The statutes do not, as matter of law, cover the facts herein." (p. 107.)

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld." (109-110.)

As stated in the case of *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 52; 80 L. Ed. 1033; 56 S. Ct. 720:

"Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may

be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. * * *"

In interpreting the above quoted opinion the California Supreme Court in *Drummey v. State Board of Funeral Directors,* 13 Cal. (2d) 75, 85; 87 Pac. (2d) 848, stated:

> "In view of these principles, it necessarily follows that the court to which the application for mandate is made * * * must exercise an independent judgment on the facts."

It would seem worthy of consideration that here and in the *McAnnulty* case the plaintiff alleged all that it was possible for an innocent person to allege concerning the invalidity of a postal fraud order. There is no provision in the statute allowing a person the right of appeal or requiring the Post Office Department to furnish a person affected with a copy of the proceedings, or even giving him the right to obtain one, and where as here, he did not or could not attend the hearing he is helpless to allege facts other than the ultimate facts concerning his innocence of the charges made. Ordinarily the Findings of Fact, though unsupported by any evidence, would doubtless not appear to be insufficient. It is probably an exceptional case where the findings, as here, establish upon their face that the order is unsupported by evidence.

It would seem especially worthy of note that other agencies, such as the Federal Trade Commission and the Labor Relations Board, the enforcement of the orders of which are of much greater importance to the nation, have not the power to make their orders effective except under the control of a Circuit Court of Appeals. Yet it will doubtless be conceded that these administrative agencies are much better organized and equipped to conduct impartial hearings than the Post Office Department.

In view of the severe penalty involved and of the summary manner in which postal fraud orders are made, it would seem that all persons affected should be held entitled to a trial *de novo* in the district of residence of the local postmaster and that a complaint alleging innocence of the charges made should be held sufficient to invoke the jurisdiction of the court.

It would seem that the complaint states a cause of action and that in violation of Anglo-American rules of procedure and due process this petitioner has been deprived of his day in court.

POINT IV.

The Form of the Order and the Manner in Which It Was Made Is in Violation of Petitioner's Constitutional Rights, Because: (a) An Administrative Agency Cannot Inflict a Punishment Such as Has Been Inflicted Here, and (b) Nor Can It Take a Portion of a Person's Liberty—as Distinguished From His Property—and Inflict Such a Punishment, in the Manner Done Here, to-Wit, at a Hearing Held Three Thousand Miles From His Place of Residence, Without the Presumption of Innocence, the Right to a Jury Trial Before an Impartial Judicial Tribunal, and the Protection of His Other Civil Rights Guaranteed by the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States.

With the court's permission, if and when the within petition is granted, petitioner will file a supplemental brief in support of this point.

From the foregoing it would appear that the questions involved are of sufficient importance to justify consideration by this court.

Respectfully submitted,

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APPENDIX "A".

Opinion of District Court in Case of Acret v. Harwood.

(41 Fed. Supp. 492, filed Oct. 25, 1941.)

YANKWICH, *District Judge.*

On June 28, 1941, the Postmaster General of the United States made a fraud order against W. H. Neher and Private Laboratory of W. H. Neher, and their officers and agents at La Verne, California. George Acret, the plaintiff, is a California attorney at law, representing Neher. On August 4, 1941, he addressed to him two letters at 2510 E Street, La Verne. Mary A. Briggs, Postmaster of Los Angeles, refused to forward one of the letters, and ordered it returned to Acret as "unmailable." On August 5, 1941, A. E. Harwood, Postmaster of La Verne, stamped the other letter "fraudulent", and ordered it returned to the sender.

In the complaint on file, the plaintiff seeks to vacate the fraud order and to enjoin the postmasters of La Verne and Los Angeles from refusing to deliver his mail to Neher. The fraud order is attacked as unconstitutional, as is also the statute under which it was made (39 U. S. C. A. 259).

The defendants have moved to dismiss the complaint for failure to state a claim.

The plaintiff has asked that a three-judge court be convened to hear the matter, under the mandate of Section 380(a) of Title 28 U. S. C. A.

I am of the view that the motion to dismiss should be granted, and that the request for a three-judge court to hear the matter should be denied. In what follows, I state the grounds for these conclusions.

1. *The Motion to Dismiss.*

The defendants' motion to dismiss is grounded upon the proposition that no relief can be granted in this case because the fraud order of the Postmaster General, dated June 28, 1941, in obedience to which the mail directed to W. H. Neher is not delivered, cannot be set aside in a proceeding to which the Postmaster General, who is given sole authority by the Congress to make the order, is not before the court. The contention is well grounded. (See: Warner Valley Stock Co. v. Smith, 1897, 165 U. S. 28; Gnerich v. Rutter, 1924, 265 U. S. 388; Webster v. Fall, 1925, 266 U. S. 507; Jewell Products, Inc. v. Morganthau, 1938, 100 F. (2d) 390; James v. Lake Wales Citrus Growers Ass., 1940, 5 Cir., 110 F. (2d) 652; and my opinions in Eastman v. United States, 1939, 28 Fed. Sup. 807; Redlands Foothill Groves Ass. v. Jacobs, 1940, 30 Fed. Sup. 995). In my two opinions just cited, I endeavored, *as other judges have done,* to draw a distinction between the cases where the acts of the subaltern may be placed under a court interdict without the presence before the court of his superior officer, and the others wherein the presence of *the superior officer is indispensable.* I found the power of the court to constrain the subaltern to apply only to cases where the *very power* of the superior to act is challenged and the act of the subaltern, in endeavoring to execute the order, amounts to a trespass.

Counsel insists that this is the case here. I cannot agree. There is no assertion of absence of statutory authority to enter a fraud order. The procedure is specifically provided for in Section 259, Title 39 U. S. C. A. And the power so conferred is discretionary, like that of

other administrative or executive functionaries. Presumption of validity attaches to it. And it can be impugned only when exercised arbitrarily. In other words, abuse of discretion must be shown before a court will interfere. (See: Bates & Guild Co. v. Payne, 1904, 194 U. S. 106; Public Clearing House v. Coyne, 1904, 194 U. S. 497; United States v. Chemical Foundation, 1926, 272 U. S. 1, 15; Proctor & Gamble v. Coe, 1938, 96 F. (2d) 519; National Conference on Licensing Lotteries v. Farley, 1938, App. D. C., 96 F. (2) 861; Farley v. Simmons, App. D. C., 1938, 99 F. (2) 343; Farley v. Heininger, 1939, App. D. C., 105 F. (2) 79.) In this respect, the controlling principles do not differ from those which govern the actions of other executive officers whose decisions are given finality by the Congress, and, *in obedience to that authority, by the courts.* (See my opinion in United States v. Standard Oil Co., D. C. Calif., 1937, 21 Fed. Sup. 645; United States v. Standard Oil Co., 1927, D. C. Calif., 20 Fed. Sup. 427.) So, the assertion of arbitrariness or error in arriving at the conclusion is not a challenge of the foundation of the authority.

It assails merely *the manner of its exercise.*

A judicial review of the manner of exercise of this authority cannot be had without the presence in court of the executive officer who is given the statutory right to make the particular order. And mere assertion of unconstitutionality is not enough. So the situation here is not that which confronted me in Eastman v. United States, D. C. Wash., 1939, 28 Fed. Sup. 807, but the one which confronted me in Redlands Foothill Groves v. Jacobs, 1940, D. C. Calif. 30 Fed. Sup. 995.

For the court to interfere with the carrying into effect of the order of a cabinet officer, made under statutory power, in a district where the officer does not reside would introduce chaos into our governmental system. For, let us imagine a concern, the business of which extends to a large number of localities, scattered all over the United States. We would then have the spectacle of district courts all over the country interfering with the act of a cabinet officer and compelling him to appear in districts other than that which by the Congress is declared to be his official residence,—"at the seat of government"—(5 U. S. C. A. Sec. 338) to defend himself.

Compared with this inconvenience, the inconvenience of the person or the institution against whom a fraud order is made, after a hearing, in going to the District of Columbia, the official residence of the Postmaster General, and seeking relief, is the less of the two. Certainly, in this day of easy transportation, it is not a great hardship on a litigant, who seeks to impugn the validity of the order of a cabinet officer, made under explicit statutory authority, to go to the district of the Cabinet Officer's official residence for judicial redress. The post office establishment is one of our oldest. Its ramifications are, perhaps, greater than that of any other executive department.

In view of the great variety of complicated problems with which the head of the department is confronted, there is good reason for insisting, *as the Congress has done*, that whoever seeks redress against his acts should go to

the district of his residence. Inconvenience, of course, should not determine legality. Nonetheless, when it is insisted that we take jurisdiction because, otherwise, inconvenience would result, it is well to balance inconveniences.

And it will not do to say that we are dealing with civil liberties. The sending of letters through the mail is not a right. The record in the companion proceeding shows that a hearing was had, notice of which was given to Neher. He chose not to appear. Nonetheless, testimony was presented and a decision was arrived at, after full consideration.

It would be stretching the concept of due process to say that a person who voluntarily absents himself from a hearing, or those seeking to communicate with him, should be given the privilege of suing the cabinet officer at a place other than his official residence, in order to establish before a court the fact that the officer was guilty of error. Our governmental system abhors absolutes. It postulates the possibility of error. Methods for review of official abuse of power are inherent in it. But we should not remove all limitations in pursuit of an unattainable ideal of due process.

The object of the fraud order is not to interfere with any of the rights of the people, but to refuse the facilities of the post office establishment to matter defined to be objectionable by the Congress or found to be such by the Postmaster General, after a hearing. (See: *Ex parte*

Jackson, 1877, 96 U. S. 727.) While the constitution has given to the Congress the sole power to establish a postal system (Constitution of the United States, Art. 1, Sec. 8, Cl. 7), it is not beyond the realm of possibility that the Congress might have declined to exercise this power, as, in fact, it refused, for over a century, to extend postal facilities to parcels. The mere establishment of the postal system does not, automatically, confer any rights upon individuals to receive the service, without the restraints or limits imposed under statutory authority.

(2) *The Motion to Call a Three-Judge Court.*

The plaintiff has requested that a three-judge court be convened, under the authority of Section 380(a) of 28 U. S. C. A. The argument which precedes applies, to some extent, to this matter also. The procedure which calls for the intervention of a three-judge court is extraordinary. It should not be invoked unless there is a substantial constitutional question. (Jameson & Co. v. Morganthau, 1939, 307 U. S. 171, 172.) The right of the judge, to whom the request is addressed, to deny it, when satisfied that the challenge to constitutional validity is unsubstantial, has been recognized by the highest courts, both under this statute and under the older statute (28 U. S. C. A. 380), which confined the action of such courts to cases seeking to restrain action under state law. (See: *Ex parte* Poresky, 1933, 290 U. S. 30; California Water Service Co. v. Redding, 1938, 304 U. S. 252; *Ex parte* Brensford, 1940, 310 U. S. 354; and see my opinion in

Wylie v. State Board of Equalization, D. C. Calif. 1937, 21 Fed. Sup. 604; Rok v. Legg, D. C. Calif., 1939, 27 Fed. Sup. 243.)

Where a statute is of long standing and has been often before the courts, which have repeatedly rejected the challenge of unconstitutionality, an occasion for invoking this extraordinary remedy does not exist.

This is the teaching of the cases just referred to. The particular statute has been before the courts on repeated occasions. Among the decisions which have sustained it are *Ex parte* Jackson, 1877, 96 U. S. 727; *In re* Rapier, 1892; 143 U. S. 110; School of Magnetic Healing v. McAnnulty, 1902, 187 U. S. 94; Bates & Guild Co. v. Payne, 1904, 194 U. S. 106; Public Clearing House v. Coyne, 1904, 194 U. S. 497; Leech v. Carlile, 1922, 258 U. S. 132; New v. Tribond Sales Corp., 1927, App. D. C. 197 U. S. 671; Plapso Laboratories v. Farley, App. D. C. 1927, 92 F. (2) 228, certiorari denied Oct. 18, 1937, 302 U. S. 732; Enterprise Savings Ass. v. Zumstein, 6 Cir., 1895, 67 Fed. 1000).

A fifty year period stretches between the first and the last of these decisions. Yet we are urged to disregard this long series of rulings on the basis of the dissent of Mr. Justice Holmes and Mr. Justice Brandeis in Leach v. Carlile, *supra*, in which they expressed doubt as to the constitutionality of this section. Great as is the admiration I have for the views of these outstanding jurists, I doubt if the Supreme Court which has so recently sus-

tained the far-reaching powers conferred under the National Labor Relations Act (29 U. S. C. A. 151, *et seq.*) (See National Labor Relations Board v. Jones-Laughlin Corp., 1937, 301 U. S. 1), and the Fair Labor Standards Act (29 U. S. C. A. 201, *et seq.*) See, United States v. Darby, 1941, 312 U. S. 100) in dealing with one of the most human relationships,—that of employer and employee,—and with the rights arising from it, would join these great dissenters in their fear that inequity would result from denial to a person of the right to receive mail after a full hearing before the Postmaster General.

Administrative action has become so important a part of our governmental policy that we need have some of the misgivings which an older concept of the exclusive place of judicature in the determination of rights might engender.

I am, therefore, of the view that no substantial constitutional question is involved which calls for the intervention of a three-judge court.

The application for the convening of a three-judge court is, therefore, denied and the complaint is dismissed.

Dated this 25th day of October, 1941.

LEON R. YANKWICH,
United States District Judge.

APPENDIX "B".

Portions of Appellant's Brief in the Circuit Court.

"Statement of the Case.

* * * * * * * * *

"The plaintiff based his cause of action upon allegations establishing that the postal fraud order is void for the following reasons:

"(1) The findings of fact of the Postmaster General (attached as Exhibit "B" to the complaint) [R. 38 to 61] do not state any facts establishing that the plaintiff was guilty of any violation of the statute as charged by the (p. 2) Postmaster General, or at all, and they establish upon their face that the Postmaster General acted beyond his jurisdiction.

"(2) The plaintiff was engaged in a legitimate business and he was in fact not guilty of making any fraudulent representations or of any violation of the statute. [R. 2 to 61.]

"(3) There was no evidence adduced at the hearing before the Post Office Department sufficient to support the Postmaster General's findings of fact or such fraud order. [R. 38 to 61.]

"(4) The postal fraud order in question constitutes a taking of the plaintiff's *property and liberty* without due process of law in violation of his constitutional rights. [R. 8.]

"(5) The postal fraud order statute (U. S. C. A., Title 39, Sec. 259) is unconstitutional for various reasons. [R. 8 to 12.]*

* * * * * * * * *

"*The question of the unconstitutionality of the statute has been and is abandoned, and as hereafter shown under Point II, it has been removed from the case. (p. 3.)

* * * * * * * * *

"Questions Involved.

"1. Does the complaint state facts sufficient to entitle the plaintiff to any relief, regardless of any question of the constitutionality of the statute?

"2. Where the plaintiff did not seek to enjoin the operation of a statute or where the questions involving the constitutionality of the statute itself have been held not substantial, is the plaintiff entitled to a hearing on the merits before a single judge upon the other questions involved in the case?

"3. Is the postal fraud order involved herein, both as to the procedure by which it was made and as to its form, violative of the plaintiff's constitutional rights?

"4. Where the local postmaster is acting under a void postal fraud order is the Postmaster General a necessary party? (p. 6.)

* * * * * * * * *

"Appellant desires to make clear at this point that he is not here attacking the constitutionality of the statute itself. If there is any question with regard to this, he waives that question here and now." (p. 20.)

(In his brief, respondent did not respond to, or attempt to answer in any manner, Questions 1, 2 and 3 aforesaid.)

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481481—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 292

W. H. NEHER, PETITIONER

v.

A. E. HARWOOD, INDIVIDUALLY AND AS POSTMASTER OF THE CITY OF LA VERNE, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court of the United States for the Southern District of California, Central Division, rendered no opinion in this case.[1] The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 80–102) is reported in 128 F. (2d) 846.

[1] The District Court referred to its opinion in *Acret* v. *Harwood*, 41 F. Supp. 492, a case heard with the instant case, as discussing "the fundamental principles of law" involved in this case (R. 4). See *infra*, p. 6.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 5, 1942 (R. 103). The petition for writ of certiorari was filed August 11, 1942. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Postmaster General is an indispensable party to an action to restrain a local postmaster from carrying into effect a postal fraud order.

2. Whether the instant suit was properly dismissed for failure to state a cause of action.

STATUTE INVOLVED

The applicable portion of the statute involved is set forth in the Appendix, *infra,* pp. 12–13.

STATEMENT

On March 20, 1941, the Post Office Department forwarded to petitioner a memorandum (R. 38) charging him with violations of the postal fraud order statute.[2] The memorandum charged that petitioner was engaged in obtaining money through the mails by means of false and fraudulent representations to the effect that by placing "tuning-in" cards, filled out by the persons from

[2] Private Laboratory of W. H. Neher also was named as a respondent (R. 37–40).

whom he obtained the money, in a "cosmic generator" maintained in his "laboratory" he could bring the bodies of those persons into harmony with cosmic forces and thereby cure 99 percent of every form of disease or ailment they might have (R. 39–40). Petitioner was afforded an opportunity to show cause on April 14, 1941, why a fraud order should not be issued against him. On April 11, 1941, he filed an answer denying the charges and transmitting circular matter used in the operation of his enterprise. However, he did not appear at the hearing held on April 14, 1941, and no appearance was made on his behalf (R. 38). On May 12, 1941, there was forwarded to him a transcript of the proceedings together with a descriptive list of the exhibits and he was given until June 5, 1941, to make any further statements as to why a fraud order should not be issued against him (R. 38–39). On that date a brief was filed on his behalf (R. 38–39).

Testimony and documentary evidence introduced by the Government at the hearing established the following facts: Petitioner is a retired farmer, sixty-nine years of age, and possesses a high-school education. His enterprise consisted of the operation of a so-called cosmic generator in which, for a stated fee, he placed the name of the patron written on a card bearing a prayer (R. 47–49). Petitioner asserted that he had set up in the machine a cosmic field or atmosphere by focalizing a number of cosmic forces and cosmic

rays (R. 45). The alleged theory of the operation was that the cosmic forces generated by the machine brought the patron in harmony with the "Life Forces" surrounding him and enabled him to become cured of his bodily ills as prayed (R. 47–48). Petitioner's circular claimed that cures of 99 percent of all diseases could be effected in this manner (R. 48, 57–58). It was not claimed by petitioner that the cures were effected by the prayers or divine intervention alone; he claimed rather that they could be effected only through the interposition of his cosmic machine (R. 59). The rate charged by petitioner for the use of his machine was the tuning-in charge of fifty cents and a rental charge of one dollar per month for each name (R. 49). A family rate of three dollars per month plus a tuning-in charge of one dollar was also offered by petitioner (R. 49).

Expert testimony disclosed that neither petitioner's machine nor any other device known to science can change the direction of cosmic rays or produce a so-called cosmic field (R. 55). Expert testimony also was introduced to show that human ailments are not due to disharmony of the body with cosmic forces or radiation but result from changes and destruction of the tissues (R. 55). One individual who had filled out and forwarded a so-called prayer card to petitioner together with a remittance testified that a condition thought to be due to an attack of infantile paralysis had not been benefited (R. 56–57).

Upon the basis of the foregoing evidence the Acting Solicitor of the Post Office Department made findings of fact and recommended that a fraud order be issued (R. 37–61). Thereafter, on June 28, 1941, the Acting Postmaster General issued an order to the postmaster at La Verne, California, directing that all letters and other mail matter addressed to W. H. Neher and Private Laboratory of W. H. Neher be returned to the postmasters at the offices where they were originally mailed, for delivery to the senders with the words "Fraudulent: Mail to this address returned by order of Postmaster General" written or stamped upon the outside of the letters or other mail matter (R. 23–24).

On August 8, 1941, petitioner filed in the United States District Court for the Southern District of California a complaint against the postmaster at La Verne, who is the respondent herein (R. 7–37). The complaint alleged various facts with respect to petitioner's enterprise (R. 13–14, 31–32) and petitioner attached a copy of the Acting Solicitor's findings and recommendation (R. 25, 37–61) and other documents. Alleging that the postal fraud order statute is unconstitutional and that the fraud order was unsupported by evidence and void, the complaint prayed that the order be vacated, that respondent be enjoined from carrying out the order, and that the statute be declared unconstitutional (R. 37).

Respondent moved to dismiss the complaint on the ground that "the plaintiff has failed to state a claim upon which relief can be granted" (R. 61). Authorities to the effect that the Postmaster General was an indispensable party to the suit were filed in support of the motion, but the motion was based also upon "the other documents and papers on file in this action" (R. 61). On October 25, 1941, after a hearing upon the motion, the district court entered a minute order dismissing the complaint (R. 4). The order referred to the court's decision of the same date in *Acret* v. *Harwood,* 41 F. Supp. 492, as discussing the principles of law involved and also stated that no substantial constitutional question was presented.[3] On October 29, 1941, judgment was entered dismissing the complaint on the ground that it failed "to state a claim upon which relief can be granted" and denying an application for the convening of a three-judge court on the ground that the complaint failed to raise a substantial constitutional question warranting any relief (R. 63–64).

On appeal to the Circuit Court of Appeals for the Ninth Circuit petitioner withdrew his conten-

[3] *Acret* v. *Harwood*, supra, was a suit brought by petitioner's attorney to vacate the fraud order here involved and to enjoin the local postmasters from refusing to deliver mail sent to petitioner by the plaintiff. In its opinion sustaining the motion to dismiss the complaint in that case for failure to state a claim, the court held that the Postmaster General was an indispensable party and, apparently, based its action on that ground.

tions that the statute is unconstitutional (R. 81). The court affirmed the judgment on the grounds (1) that the Postmaster General is an indispensable party and (2) that the complaint fails to state a cause of action (R. 80–103).[4]

ARGUMENT

The principal question raised by the petition for writ of certiorari, and the only question of general importance, is whether the Postmaster General is an indispensable party in a suit to enjoin a subordinate postmaster from carrying out a fraud order issued by the Postmaster General or, as in this case, by the Acting Postmaster General; no question as to the validity of the statute pursuant to which the order was issued is presented (see Pet. 4).

1. The holding of the court below that the Postmaster General is an indispensable party conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Rood* v. *Goodman*,

[4] Prior to the decision of the circuit court of appeals and to the taking of the appeal to that court, petitioner and the plaintiff in *Acret* v. *Harwood*, *supra*, filed in this Court a motion for leave to file a writ of mandamus to compel the district judge to vacate the judgments in this case and the *Acret* case and to convene a three-judge court to hear the cases (R. 5, 65–73). This Court denied the motion on December 15, 1941 (*Ex parte George Acret*, No. ——, Original, October Term, 1941), and on January 12, 1942, denied a petition for rehearing and a motion for leave to file a supplemental or amended petition for writ of mandamus.

83 F. (2d) 28, certiorari denied, 299 U. S. 551.[5] However, it accords with that of the Second Circuit in *National Conference on Legalizing Lotteries, Inc.* v. *Goldman,* 85 F. (2d) 66, and is supported by the decisions of this Court in such cases as *Warner Valley Stock Company* v. *Smith,* 165 U. S. 28; *Gnerich* v. *Rutter,* 265 U. S. 388, and *Webster* v. *Fall,* 266 U. S. 507. Although the later decision of this Court in *Colorado* v. *Toll,* 268 U. S. 228, has been variously interpreted in the lower federal courts as limiting or overruling those decisions,[6] no necessity exists to determine their applicability in this case or to resolve the conflict with the decision in the *Rood* case.

This is true because the result in this case is supportable on the second and independent ground of the decision below, namely, that the complaint fails to state a cause of action. In *Brooks* v. *Dewar,* 313 U. S. 354, which arose upon the overruling of a demurrer to a bill to enjoin a subordinate of the Secretary of the Interior, it was contended

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[5] In the *Rood* case the circuit court of appeals upheld the fraud order on the merits and the petition for writ of certiorari raised only the question of the validity of that action. However, in opposing the petition the Government contended, in accordance with its position here, that even if the order was invalid, the plaintiff should not prevail since the court erred in holding that the Postmaster General was not an indispensable party. Brief for respondent in opposition, No. 91, October Term, 1936.

[6] See cases commented on in *National Conference on Legalizing Lotteries, Inc.* v. *Goldman, supra.*

that the Secretary was an indispensable party. However, the Court declined to pass upon the question. It said (at 359–360):

> We are not disposed to attempt a critique of the authorities. Since the jurisdiction and the procedure of the court below is sustained by decisions of this Court, we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence, where, as here, the bill fails to make a case upon the merits.

The instant case presents a parallel situation, except that here there is no occasion for this Court to grant certiorari even for purpose of determining whether the complaint states a cause of action, since that question involves no principle of law not already settled, and since the court below, unlike the supreme court of Nevada in the *Brooks* case, decided the question correctly.

2. Although it may be doubted whether the district court passed on the sufficiency of the complaint to state a cause of action apart from the question whether the Postmaster General was an indispensable party, the motion to dismiss was worded broadly enough to raise the point (*supra*, p. 6) and the judgment of dismissal was not without prejudice (R. 63–64). In any event, moreover, no substantial rights of petitioner were infringed by the action of the circuit court of appeals in holding that the complaint was insufficient. For that holding is clearly correct.

The facts alleged in the complaint regarding petitioner's enterprise (R. 13–14, 31–32) are not inconsistent with those hereinbefore summarized (pp. 3–4), shown by the evidence as quoted or described in the Acting Solicitor's memorandum recommending that the fraud order be issued. A copy of the memorandum was attached to the complaint (R. 37–61) and was relied on by petitioner as supporting the conclusions he alleged (R. 26–29). There is no allegation that the evidence therein reported is an inaccurate or incomplete reflection of the transcript of the hearing, a copy of which had been forwarded to petitioner after he had failed to appear or to be represented at the hearing (*supra,* p. 3); and the evidence is ample to support the fraud order since it shows that petitioner's representations as to the cures his machine could work, for a fee sent through the mails, were false (*supra,* p. 4).[7]

The order is in the form expressly authorized by the statute (Appendix, *infra,* p. 12) and since the Acting Postmaster General was empowered to issue it "upon evidence satisfactory to him" that petitioner was engaged in obtaining money through

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[7] Petitioner contends (Pet. 3, 19) that the Department and court below erred in relying on a "highly prejudicial" circular (R. 41) the distribution of which, as he asserts, had been discontinued by him prior to the date of the charges. However, they relied also on a leaflet (R. 43–50) concededly (Pet. 19) in use at the time and upon other evidence, and the evidence hereinbefore summarized is not based on the discontinued circular.

the mails by means of false representations, it was properly upheld. *Leech v. Carlile,* 258 U. S. 138, 139–140.

CONCLUSION

The decision of the court below is correct, and while in conflict with the opinion of another Circuit Court of Appeals on one point, it is sustainable on another and independent ground. It is respectfully submitted, therefore, that the petition should be denied.

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SEPTEMBER 1942.

APPENDIX

Section 3929 of the Revised Statutes as amended by Section 2 of the Act of September 19, 1890, c. 908, 26 Stat. 455, 456, and by Section 4 of the Act of March 2, 1895, c. 191, 28 Stat. 963, 964 is as follows (39 U. S. C. 259):

> The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General

may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 292

W. H. NEHER,

Petitioner,

vs.

A. E. HARWOOD, individually and as Postmaster of the City of La Verne, California,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

It would seem that counsel in their brief in opposition have made incorrect and misleading statements concerning the contents of a writing. [Ex. B of complaint, R. 43.]

The petitioner did not assert in his circular that he had "set up a cosmic field," as stated in respondent's brief at page three. He asserted: "we have *endeavored* to set up a cosmic field * * *." [R. 45.] (Emphasis added.)

Petitioner's circular did not claim "that cures of 99% of all diseases could be affected in this manner." (Resp. Br. p. 4.) He stated in his circular in question and answer form, as alleged in the complaint [R. 22], and as set forth in the findings of fact of the Post Office Department [R. 48], as follows:

> "Q. Will the Cosmic Forces *set in motion through prayer* cure every form of disease or ailment? A. If a Cosmic Field *could be* produced that would be *in perfect harmony with God* that *might be possible*. Under our present setup *perhaps not over 97* percent *will yield* to General Prayer." [R. 57.] (Petitioner's Br. p. 20.) (Emphasis added.)

These differences constitute of course the differences between fraud and no fraud. No statements were made which are sufficient to justify the character of right punishment which was inflicted here.

It would appear that there is no question but that the complaint states a cause of action in that it establishes that the findings of fact of the Post Office Department are not supported by the evidence. This is the reason number three which the appellate court in its opinion erroneously states is "practically the same as (1)." [R. 80.] (Appendix to Petitioner's Br. p. 9.)

The fact is, the complaint contains additional allegations [R. 14 and 33] which make it almost identical with the allegations of the complaint which was involved in the leading case of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 96, and which this court

expressly held to be sufficient in an opinion which has been cited and approved more than one hundred times.

It would seem also that counsel have misstated the questions involved by ignoring petitioner's Question Number Four (Petitioner's Br. p. 6) and by ignoring the fact that petitioner's complaint states a cause of action also by reason of the additional questions raised by this contention, to wit: that the order made is violative of petitioner's constitutional rights in that:

> "The form of the order and the manner in which it was made is in violation of petitioner's constitutional rights, because: (a) an administrative agency cannot inflict a punishment such as has been inflicted here, and (b) nor can it take a portion of a person's liberty—as distinguished from his property—and inflict such a punishment, in the manner done here, to-wit, at a hearing held three thousand miles from his place of residence, without the presumption of innocence, the right to a jury trial before an impartial judicial tribunal, and the protection of his other civil rights guaranteed by the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States."

Petitioner is entitled to his day in court to have these questions considered on the merits.

Surely petitioner's contentions and the precise allegations of his complaint should not be glossed over in the manner done in respondent's brief. Counsel completely disregards the fact that petitioner is seeking to avoid a

continuous and degrading punishment, probably in excess of that imposed in any criminal case, and that even the lowest criminal is entitled to his day in court—and a fair statement of his case. The question of whether or not a person has been deprived of one of his most precious liberties in violation of his constitutional rights should not be dealt with in any such loose and callous manner.

We are astonished that counsel do not desire to have the nationally important questions raised heard and disposed of by this court.

Respectfully submitted,

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